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Public Prosecutor v Ramachandran Saminathan

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HIGH COURT (PULAU PINANG) — CRIMINAL APPEAL NO PA-41H-10–04 OF 2019
MOHD RADZI JC
13 DECEMBER 2019

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Criminal Procedure — Appeal — Appeal against sentence — Whether sentence imposed by magistrate wrong and inadequate — Whether magistrate had discretion to impose sentence — Whether charge against respondent set out correct punishment — Whether magistrate failed to make an order that respondent paid duty payable on goods under s 119A of the Customs Act 1967 — Customs Act 1967 ss 119A & 135(1)

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This was an appeal by the prosecution against sentencing by the magistrate court for an offence under s 135(1) of the Customs Act 1967 ('the Act'). The respondent was an Indian national working in Malaysia. On 2 April 2019, he was arrested for possession of uncustomed goods, namely cigarettes, at a sundry shop in Georgetown, Pulau Pinang. The respondent was unpresented and he pleaded guilty. Based on the notes of the proceedings the magistrate was satisfied that the respondent understood the charge and the effect and consequences of the plea of guilty. The magistrate convicted the respondent for the charge and sentenced him to five days imprisonment from the date of arrest and fine of RM4,000, in default of ten months imprisonment. The primary ground of the appeal was that the magistrate had erred in fact and law when passing sentence based upon the consideration of the reasonableness of the fine in comparison to the value of the uncustomed goods instead of passing sentence in accordance with s 135(1)(v)(aa) of the Act. It was contended that in passing sentence of five days and fine of RM4,000, the magistrate had departed from the plain requirement of the law and the sentence was allegedly wrong and inadequate. The appellant argued that the magistrate had clearly disregarded the limits of punishments as plainly provided when deciding that the meaning of whichever was the greater amount did not necessarily mean the greater between the value of the uncustomed goods multiplied by ten compared to RM100,000. It was contended that: (a) the magistrate's view, that the determination of the value of whichever was greater must take into account the reasonableness of the fine compared to the uncustomed goods, was contradictory to the formula that was plainly provided in s 135(1)(v)(aa) and was not supported by any statutory or judicial authority; (b)the sentence was manifestly inadequate and did not take into account the intent and objective of the law: (c) whether the charge that was read to the respondent had set out the correct punishment according with the law; and (d) that the magistrate failed

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to make an order that the respondent paid the duty payable on the goods as required under s 119A of the Act.

Held, allowing appeal:

(1) The learned magistrate ad filed to address her judicial mind to the principles of law. Her of how sentence was evaluated under s 135(1)(v)(aa) in the Act was obviously in contradiction to the plain and unambiguous words of that provision. The words 'whichever is the greater amount' was plain and not in any way unclear as to its meaning. It was not open to the Magistrate to import it into any other interpretation. As such, the sentence of fine of RM4,000 was not in accordance with the law (see para 19).

(2) The magistrate had incorrectly applied the imprisonment term punishable under s 135(1)(v)(aa) of the Act. Her grounds of judgment stated the offence was punishable with an imprisonment of three years — this was the position prior to the 2018 amendment to the Act. Therefore, it seemed that the magistrate was unaware of the minimum imprisonment term (see para 21).

(3) The court was satisfied that the charge was read to the respondent and to which the respondent pleaded guilty was based on the correct provision of the law. The respondent was not misled and there was no miscarriage of justice. The sentence as appearing in the record of appeal might have been a result of an error when the note of proceedings was being prepared (see para 22).

(4) With regards to the issue of the respondent's liability to pay duty, that liability could not be disputed since it was provided under s 119A as an order made by a court pursuant to any conviction for an offence under the Act. There was no requirement that the charge reflected that obligation since the payment of duty was not a punishment for an offence but an obligation that must be discharged under the provision of the Act (see para 23).

(5) The court was satisfied that the magistrate's decision on sentence was not in accordance with the law and was manifestly inadequate. The respondent's sentence was substituted with six months' imprisonment to run from the date of the decision and the respondent was ordered to pay the duty payable on the goods amounted to RM2,579.76, in default one month imprisonment under s 119A of the Act (see paras 25 & 28).

[Bahasa Malaysia summary

Ini adalah rayuan oleh pihak pendakwaan terhadap hukuman oleh mahkamah majistret bagi kesalahan di bawah s 135(1) Akta Kastam 1967 ('Akta tersebut'). Responden adalah warganegara India yang bekerja di Malaysia. Pada 2 April

2019, beliau telah ditangkap kerana memiliki barang-barang tak berkastam, iaitu rokok, di sebuah kedai runcit di Georgetown, Pulau Pinang. Responden tidak diwakili peguam dan beliau telah mengaku salah. Berdasarkan nota keterangan, majistret telah berpuas hati bahawa responden memahami pertuduhan dan kesan serta akibat dari pengakuan salah. Majistret menjatuhkan responden atas pertuduhan tersebut dan menjatuhkan hukuman penjara lima hari dari tarikh tangkapan dan denda RM4,000, jika gagal bayar sepuluh bulan penjara. Alasan utama rayuan adalah bahawa magistret terkhilaf dari segi fakta dan undang-undang apabila menjatuhkan hukuman berdasarkan kepada pertimbangan kewajaran denda terhadap nilai barang-barang tidak berkastam dan bukannya menjatuhkan hukuman berdasarkan kepada s 135(1)(v)(aa) Akta tersebut. Adalah dihujahkan bahawa dalam menjatuhkan hukuman lima hari dan denda sebanyak RM4,000, majistret telah beralih dari syarat biasa undang-undang dan hukuman tersebut adalah tidak tepat dan tidak berpatutan. Perayu berpendapat bahawa majistret telah dengan jelas tidak mengendahkan had hukuman yang biasanya ditetapkan apabila membuat keputusan bahawa mana-mana jumlah yang lebih besar tidak semestinya bermakna lebih besar antara nilai barangan tidak berkastam yang didarabkan dengan sepuluh berbanding RM100,000. Ianya telah dihujahkan bahawa: (a) pandangan majistret, bahawa penentuan nilai mana yang lebih besar mesti mengambil kira nilai munasabah denda berbanding barang-barang tidak berkastam, bercanggah dengan formula yang dengan jelas diperuntukkan dalam s 135(1)(v)(aa) dan tidak disokong oleh mana-mana akta atau nas undang-undang; (b) hukuman tersebut dengan secara nyata tidak berpatutan dan tidak mengambil kira niat dan objektif undang-undang: (c) sama ada pertuduhan yang dibacakan kepada responden telah menetapkan hukuman yang tepat menurut undang-undang; dan (d) bahawa majistret terkhilaf dalam membuat suatu perintah bahawa responden telah membayar duti ke atas barang-barang sebagaimana yang dikehendaki di bawah s 119A Akta tersebut.

Diputuskan, membenarkan rayuan:

(1) Majistret yang bijaksanana telah terkhilaf apabila gagal untuk meletakkan fikiran kehakiman beliau terhadap prinsip undang-undang. Pemikiran beliau tentang bagaimana hukuman harus diputuskan di bawah s 135(1)(v)(aa) dalam Akta tersebut jelas bertentangan maksud nyata dan tersirat peruntukan tersebut. Perkataan 'mana-mana jumlah yang lebih besar' adalah nyata dan tidak dalam apa-apa cara tidak mempunyai maksud yang jelas. Ianya jelas tidak memberikan peluang kepada Majistret untuk membawa kepada tafsiran lain. Oleh itu, hukuman denda sebanyak RM4,000 tidak mengikut undang-undang (lihat perenggan 19).

(2) Majistret telah terkhilaf dalam pemakaian terma penjara boleh dijatuhkan di bawah s 135(1)(v)(aa) Akta tersebut. Alasan

penghakimannya menyatakan bahawa kesalahan tersebut boleh dihukum penjara selama tiga tahun — ini adalah kedudukan sebelum pindaan 2018 Akta tersebut. Oleh itu, ianya menunjukkan bahawa majistret tidak menyedari terma penjara minimum (lihat perenggan 21).

(3) Mahkamah berpuas hati bahawa pertuduhan tersebut telah dibacakan kepada responden yang mana responden telah mengaku salah berdasarkan peruntukkan undang-undang yang tepat. Responden tidak dikelirukan dan tidak ada kekhilafan keadilan. Hukuman yang terdapat dalam rekod rayuan itu mungkin disebabkan oleh kesilapan apabila nota keterangan sedang disediakan (lihat perenggan 22).

(4) Berkenaan dengan isu liabiliti responden untuk membayar duti, liability tersebut tidak dapat dipertikaikan kerana ianya diperuntukkan di bawah s 119A sebagai perintah yang dibuat oleh mahkamah bersesuaian dengan setiap sabitan atas kesalahan di bawah Akta tersebut. Tidak ada keperluan bahawa pertuduhan harus mencerminkan tanggungjawab tersebut kerana pembayaran cukai duti bukanlah hukuman bagi suatu kesalahan tetapi suatu kewajipan yang mesti dilepaskan di bawah peruntukan Akta tersebut (lihat perenggan 23).

(5) Mahkamah berpuas hati bahawa keputusan majistret terhadap hukuman tidak bertepatan dengan undang-undang dan dengan jelas tidak berpatutan. Hukuman responden diganti dengan hukuman penjara enam bulan dari tarikh keputusan dan responden diperintahkan untuk membayar cukai duti yang perlu dibayar ke atas barang-barang berjumlah RM2,579.76, jika tidak bayar penjara satu bulan di bawah s 119A Akta (lihat perenggan 25 & 28).]

Cases referred to

Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193, FC (refd)
Jayanathan v PP [1973] 2 MLJ 68, FC (refd)
Leong Kok Huat v PP [1998] 6 MLJ 406, HC (refd)
PP v Hew Yew [1972] 1 MLJ 164 (refd)
PP v Mohamed Nor & Ors [1985] 2 MLJ 200b, SC (refd)
PP v Mohd Salim Hamiddulrahman [1998] MLJU 254; [1998] 4 CLJ 199, HC (refd)
R v Teo Woo Tin [1932] 1 MLJ 124 (refd)
Tan Boon Kean v PP [1995] 3 MLJ 514, FC (refd)

Legislation referred to

Customs Act 1967 ss 119A, 127(1), 135(1)(d), (1)(v)(aa)

Abirami a/p Shanmugam (Deputy Public Prosecutor, Royal Malaysian Customs Department) for the appellant.
Ahilan a/l Natarajah (N Ahilan & Assoc) for the respondent.

Mohd Radzi JC:

INTRODUCTION

[1] This is an appeal by the prosecution against sentencing by the magistrate court for an offence under s 135(1)(d) of the Customs Act 1967 ('appeal').

BACKGROUND

[2] The respondent was charged with an offence under s 135(1)(d) of the Customs Act 1967 ('the CA'). The charge read as follows :

> Pertuduhan:
>
> Bahawa kamu, Ramachandran Saminathan (no. Pasport: P9475364) pada 02 haribulan April 2019 jam lebih kurang 2130 hrs di sebuah kedai runcit tidak bernombor berhampiran Pin Seng Hotel yang beralamat di No 82, Love Lane, 10200 Georgetown dalam daerah Timur Laut dalam negeri Pulau Pinang dengan diketahui memiliki barang-barang larangan import iaitu:

BIL	BARANG	JUMLAH SATANG
1.	Rokok jenama John 17G	400
2.	Rokok jenama John White W5	240
3.	Rokok jenama Surya Gudang Garam 16	320
4.	Rokok jenama Fisher Lights	180
5.	Rokok jenama Tex Full Flavour	660
6.	Rokok jenama John D-Biend	1,000
7.	Rokok jenama Luffman (Gold)	700
8.	Rokok jenama Luffman (Green)	360

> yang berjumlah keseluruhannya sebanyak 3,860 batang rokok yang ditaksirkan bernilai RM321.60 di mana barang-barang tersebut adalah dilarang pengimportannya di bawah Perintah Kastam (Larangan Mengenai Import) 2017 kecuali dengan cara yang diperuntukkan di Butiran 1, Bahagian II, Jadual Ketiga dalam Perintah tersebut, dan dengan demikian, kamu telah melakukan kesalahan di bawah Seksyen 135(1)(d) Akta Kastam 1967 yang boleh dihukum di bawah Seksyen 135(1)(v)(aa) Akta yang sama.

PROCEEDINGS BEFORE THE MAGISTRATE COURT

[3] The respondent is an Indian national working in Malaysia. On 2 April 2019 he was arrested for having possession of uncustomed goods, namely cigarettes as listed in the charge at a sundry shop in Georgetown, Pulau Pinang.

[4] On 8 April 2019 the respondent was charged for an offence under as described in the charge. He was unrepresented and he pleaded guilty to the said

charge. Based on the notes of proceedings the magistrate was satisfied that the respondent understood the charge and the effect and consequences of his plea of guilty.

[5] After admitting to the fact of the case as set out in exh P1 and admitting to exhs P4 and P5 being the confiscated and uncustomed goods, the magistrate proceeded to record the respondent's plea of guilty and then consequently convicted him for the offence as charged and sentenced him to five days imprisonment from the date of arrest (2 April 2019) and fine of RM4,000, in default ten month imprisonment.

[6] The prosecution being dissatisfied with the decision of the magistrate on sentence appeals to this court.

THE GROUNDS OF AND ISSUE TO BE DETERMINED IN APPEAL

[7] The primary ground of this appeal is that the magistrate had erred in fact and in law when the magistrate passed sentence based upon the consideration of the reasonableness of the fine in comparison to the value of the uncustomed goods instead of passing sentence in accordance with the provision of s 135(1)(v)(aa) of the CA. Therefore in passing sentence of five days and fine of RM4,000, the magistrate had departed from the plain requirement of the law and the sentence is therefore wrong and inadequate.

[8] The issue to be decided in this appeal is whether the approach taken by the magistrate in passing sentence was correct.

SUBMISSION

Submission by appellant

[9] The gist of the learned deputy public prosecutor submissions are as follows:

(a) that the magistrate had failed to correctly apply s 135(1)(v)(aa) of the CA when she gave an interpretation to the meaning of the words 'whichever is the greater amount' that is inconsistent with the law. In her submission learned deputy public prosecutor argued that the magistrate had clearly disregarded the limits of punishment as plainly provided in that provision when she held that the meaning of 'whichever is the greater amount' did not necessarily mean the greater between the value of the uncustomed goods multiplied by ten (or the maximum twenty) compared to RM100,000 (or the maximum RM500,000). The magistrate's view that the determination of the value of 'whichever is greater' must take into account the reasonableness of the fine compared

to the uncustomed goods is contradictory to the formula that is plainly provided in s 135(1)(v)(aa) and is not supported by any statutory or judicial authority. The sentence that was passed against the respondent was therefore bad in law and cannot be sustained. Furthermore, the sentence was manifestly inadequate and did not take into account the intent and objective of the law; and

(b) the magistrate erred when she failed to make an order that the respondent pay the duty payable on the goods as required under s 119A of the CA.

Submission by the respondent

[10] Learned counsel for the respondent submitted that:

(a) when the charge was read to the respondent the charge as stated in the notes of proceedings at p 3 of Vol 2 of the record of appeal was not based on the correct law since the charge as read to the respondent stated that apart from the payment of fine he was also punishable with an imprisonment term of up to a maximum of three years when in fact the correct term of imprisonment is not less than six months and not more than five years. Therefore, when the respondent pleaded guilty he thought he was pleading guilty to a prospect of a lesser term of imprisonment;

(b) that it was the duty of the prosecution officer to advise the magistrate on the position of the law and that failure should not result in a position that is prejudicial the respondent;

(c) that in the event this court allows the appeal, any imprisonment term should run from the date when the respondent was detained by the Immigration authorities (this court was later advised by the appellant that the respondent was detained by the immigration authorities after this appeal was filed since he is a foreigner and there was a fear that the respondent will leave Malaysia to frustrate the appeal). Since the respondent had served a total of 120 days from when he was detained until an application for bail was allowed, this court should take into account that detention period (note: at the date of the hearing of this appeal the respondent is on bail pending appeal. He applied for bail and bail was allowed before a different court subject to terms when an application for an extension of time to file this appeal was filed by the appellant); and

(d) that the liability for payment of duty pursuant to s 119A of the CA was not included in the charge and therefore it cannot be raised against the respondent.

Submission in reply by the appellant

[11] Learned deputy public prosecutor responded as follows:

(a) the charge that was read to the respondent when he pleaded guilty was in the version as appearing at p 8 of Vol 1 of the record of appeal. The charge at that page had clearly set out the correct provision of the law under s 135(1)(v)(aa) of the CA and not as appearing in the notes of proceedings at p 3 of Vol 2 of the record of appeal. There could have been an error in the transcript;

(b) it is incumbent on the magistrate to take judicial notice of all applicable laws and in any event, ignorance of the law is not an excuse for a punishment to be passed in accordance with the law; and

(c) sentence should run from the date of this decision since the detention of the respondent was only to secure his presence pending the appeal since he was a foreigner and any risk of flight had to be mitigated at the relevant time.

ANALYSIS BY THIS COURT

[12] It is pertinent at this juncture to reproduce the relevant part of the magistrate's ground of decision as found at p 23 of Vol 1 of the record of appeal:

> Perkataan di dalam peruntukkan tersebut 'whichever is greater amount' merupakan elemen yang subjektif kerana ianya bergantung kepada fakta dan nilai barangan di dalam kes masing-masing. Bagi barangan bernilai RM321.00 nilainya mencecah RM3216 bagi 10 kali ganda. Sekiranya diambil pendekatan yang literal maka nilai tertinggi adalah RM100,000 untuk barangan sejumlah 3860 rokok pelbagai jenama. Adakah pendekatan sebegini munasabah dan adil mengambil kira gravity kesalahan dan nilai barangan yang dirampas iaitu RM321.60? Tidak lupa juga perkataan 'fine of not less then ten times the value of the goods OR one hundred thousand ringgit' yang mana pilihan masih diberikan untuk memilih amaun yang rendah ataupun 'the greater amount'. Rasional di sebalik Parlimen memasukkan perkataan 'greater amount' adalah bukan hanya terletak pada nilai barangan sahaja tetapi pada keseluruhan fakta untuk Mahkamah menentukan amaun mana yang wajar untuk ditentukan. Perkataan yang digunakan adalah 'greater' dan bukannya 'higher' di mana sinonim bagi perkataan 'greater' adalah 'considerable, substantial, pronounced, sizeable, significant, appreciable, serious, exceptional, inordinate, extraordinary, special, prominent, eminent, important, distinguished, illustrious, noble; etc'. Melihat kepada maksud sebenar 'greater amount' ianya hanya boleh ditentukan mengambilkira keseluruhan fakta kes dan bukan nilai barang menjadi 'sole consideration'. Maka, faktor ini dipertimbangkan oleh Mahkamah ini untuk menentukan hukuman yang wajar ke atas tertuduh di dalam kes ini.

[13] Reading the said portion of the magistrate's grounds of judgment it is clear that in her view the method of calculation of fine as provided in s

135(1)(v)(aa) of the CA is not absolute and is subject to an evaluation of what is reasonable taking into account the value of the uncustomed goods. Whilst at a later part of her grounds of judgment she recognised the intention of Parliament in enacting such law, yet she held the view that based on the authority of *R v Teo Woo Tin* [1932] 1 MLJ 124 the calculation of fine must take into account several factors. Thus, her basis for not applying the formula as provided. At the conclusion of her grounds of judgment she then applied a multiplier of 10–20 of the value of uncustomed goods in arriving at what she held to be the adequate fine. No basis for the application of such multiplier was provided.

[14] Section 135(1)(v)(aa) of the CA states as follows:

> 135 Penalty relating to smuggling offences, evasion of duty, fraud, etc.
>
> (1) Whoever —
>
> (d) knowingly harbours, keeps, conceals, or is in possession of, or permits, suffers, causes or procures to be harboured, kept or concealed, any uncustomed or prohibited goods;
>
> ...
>
> (v) in the case of cigarettes containing tobacco or intoxicating liquor which are prohibited goods —
>
> (aa) be liable for the first offence to a fine of not less than ten times the value of the goods or one hundred thousand ringgit, whichever is the greater amount, and of not more than twenty times the value of the goods or five hundred thousand ringgit, whichever is the greater amount, or to imprisonment for a term of not less than six months and not more than five years or to both;

[15] It is trite law that where the law provides that an offender is liable to be punished with certain punishments, the words 'shall be liable' do not make the prescribed form of punishment as mandatory (see *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68, *Leong Kok Huat v Public Prosecutor* [1998] 6 MLJ 406 and *Public Prosecutor v Mohd Salim Hamiddulrahman* [1998] MLJU 254; [1998] 4 CLJ 199).

[16] However, where there is a provision of a minimum and maximum sentence that discretion must be exercised within the width of the minimum and maximum sentence. Raja Azlan Shah J in *Public Prosecutor v Hew Yew* [1972] 1 MLJ 164 stated as follows:

> There have been a few judicial pronouncements on the words 'shall be liable'. In *Public Prosecutor v Lee Ah Sam (F)* [1949] 1 MLJ 236 reg 5(1) of the Emergency Regulations, 1949 provides that the person guilty of the offence 'shall be liable to be punished with death or penal servitude for life and whipping'. The Court of Appeal held that the sentence of penal servitude for life is a maximum sentence and any

lesser sentence of penal servitude may be imposed. In *Khor Seek Pok v Public Prosecutor* [1958] 1 MLJ 170 s 6 of the Dangerous Drugs Ordinance 1952 states that a convicted person:

> shall be guilty of an offence against this Ordinance and liable on conviction to a fine of $10,000 or to imprisonment for a term not exceeding five years or to both such fine and imprisonment.

It was held that the fine of $10,000 provided under the section is not mandatory. It is in fact the maximum penalty provided and the court has a discretion to impose a fine of any sum within the maximum amount of $10,000. In *Public Prosecutor v Wahab* [1964] 1 MLJ 265 s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958, provides that on conviction an accused:

> shall be liable to imprisonment for a term not exceeding two years and to whipping

is not mandatory and a fine may be imposed in lieu of imprisonment. In *Darus v Public Prosecutor* [1964] 1 MLJ 322 it was held that the term of imprisonment of one year under s 297 of the Criminal Procedure Code is a maximum sentence and that any lesser term may be imposed as is considered appropriate to the circumstances of the particular case. It may be seen that in all these cases the words are:

> shall be liable to imprisonment for a term of ... years or fine etc

In the context of section 15(4) of the Prevention of Crime Ordinance the words are:

> shall be liable to imprisonment for a term not exceeding five years and not less than two years.

From that it seems to me that the court has an absolute discretion to impose the maximum sentence of five years or any lesser sentence the minimum of which must not be less than two years.

[17] Based on the aforesaid authorities it is therefore clear that with regards to s 135(1)(v)(aa) of the CA, whilst the court has the discretion to pass sentence based on the facts and considerations of each case that discretion however is subject to a minimum sentence which in the case of a first offender is:

(a) fine of ten times the value of the goods or RM100,000 whichever is the greater amount and not more than 20 times of the value of the goods or RM500,000, whichever is the greater amount; or

(b) imprisonment for a term of not less than six months and not more than five years; or

(c) both.

[18] In is also established law that where the words and language used in a statutory provision is clear and unambiguous then the court must apply its

plain and ordinary meaning. When a question of statutory interpretation arises the duty of the court is to give effect to the will of Parliament. In the Federal Court decision of *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514, Mohd Azmi FCJ in delivering the decision of the Federal Court stated:

> On interpretation of statutes, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed (see *Magor & St Mellons Rural District Council v Newport Borough Council* [1952] AC 189 at p 191; [1951] 2 All ER 839 at p 842). The court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the duty of the court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies.

[19] Returning to the magistrate's grounds of judgment, it is therefore clear that she had failed to address her judicial mind to the principles of law as stated above. Her own interpretation of how sentence was to be evaluated under s 135(1)(v)(aa) in the CA was obviously in contradiction to the plain and unambiguous words of that provision. The words 'whichever is the greater amount' is plain and not in any way unclear as to its meaning. It was not open to the magistrate to import into it any other interpretation. A such, the sentence of fine of RM4,000 is clearly not in accordance with the law.

[20] The case of *R v Teo Woo Tin* relied on by the magistrate cannot be taken as a correct application of the law in this case. That decision can only be relevant if the fine is provided as a general provision without any minimum and maximum limit as otherwise found in s 135(1)(v)(aa) of the CA.

[21] In addition, the magistrate had also incorrectly applied the imprisonment term punishable under s 135(1)(v)(aa) of the CA. In her grounds of judgment she stated that the offence is punishable with an imprisonment of three years. That was the position prior to an amendment to the Act in 2018. However, following the Customs (Amendment Act No 2) Act 2018 (A1580) the imprisonment term was then amended to not less than six months and not more than five years. Thus, it seems that the magistrate was completely unawares of the minimum imprisonment term and consequently passed a five day term of imprisonment on the respondent.

[22] With regards to the issue of whether the charge that was read to the respondent had set out the correct punishment in accordance with the law, this court is satisfied that based on the charge as appearing at pp 5–9 Vol 1 of the record of appeal, the charge that was read to the respondent and to which he pleaded guilty was based on the correct provision of the law. Hence, the respondent was not mislead and there was no miscarriage of justice. The sentence as appearing at p 3 of Vol 2 of the record of appeal may have been a result of an error when the note of proceedings was being prepared.

[23] With regards to the issue of the respondent's liability to pay duty, that liability cannot be disputed since it is provided under s 119A as an order made by a court pursuant to any conviction for an offence under the CA. There is no requirement that the charge reflect that obligation since the payment of duty is not a punishment for an offence but an obligation that must be discharged under the provisions of the CA. Section 119A of the CA states:

> 119A Court order
>
> (1) Where any person is found guilty of an offence under this Act, the court before which that person is found guilty shall order that person to pay to the Director General the amount of customs duty due and payable or penalty payable under this Act, if any, as certified by the Director General and such customs duty or penalty shall be recoverable in the same manner as provided under section 283 of the Criminal Procedure Code.
>
> (2) For the purpose of subsection (1), the court has civil jurisdiction to the extent of the amount of the customs duty due and payable, and the order is enforceable in all respects as a final judgment of the court in favour of the Director General.
>
> (3) Where any person found not guilty of an offence under this Act has paid the amount of customs duty due and payable or penalty payable pursuant to section 145A in respect of the offence charged, the court may order the amount so paid to be refunded to such person where no notice of appeal is filed.

CONCLUSION

[24] It is settled law that as set out by the Supreme Court in the case of *Public Prosecutor v Mohamed Nor & Ors* [1985] 2 MLJ 200b that the appellate court should be slow to interfere with a sentence passed by the court below unless it is manifestly wrong. Later in the case of *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193, the Federal Court had clearly stated that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or the court erred in applying the correct principles in the assessment of sentence.

[25] Based on the reasons aforesaid, this court is satisfied that the magistrate's decision on sentence is not in accordance with the law and further, manifestly inadequate.

[26] The value of the goods in this case has been established to be RM321.60. Based on the provision of s 135(1)(v)(aa) of the CA the minimum amount of fine that can be imposed against the respondent is RM100,000 since that is the amount greater than RM3,216 (RM321.60 x 10). However, taking into account the background of the respondent there is no likelihood

that he will be able to pay such fine. The only just punishment in this case will be imprisonment.

DECISION

[27] After hearing submissions of the deputy public prosecutor and the learned counsel for the respondent, this court finds merit in the appeal. The appeal against sentence is therefore allowed.

[28] Taking into account all mitigating factors submitted by the learned counsel for the respondent the sentence is hereby substituted with:

(a) six months imprisonment to run from the date of this decision;

(b) the respondent is ordered to pay the duty payable on the goods amounting to RM2,579.76, in default one month imprisonment under s 119A of the Customs Act 1967; and

(c) exhs P4 and P5 are forfeited and disposed by the Director General of Customs and Excise under s 127(1) of the Customs Act 1967.

Appeal allowed.

Reported by Mohd Kamarul Anwar